89-1672

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THOMAS D. POWELL,
Petitioner,

v.

WESLEY PARSONS, et al.,
Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fourth Amendment applies to the search and seizure by United States agents of a home and property owned by citizens of the United States and located in a foreign country.

II. Whether the lower courts have contraried Supreme Court precedent, regarding United States citizens' rights to constitutional protection from unreasonable search and seizures, in spite of the fact that the citizens reside in a foreign country.

## THE PARTIES

The Petitioner is Thomas D. Powell who is proceeding pro se in this application.

The Respondents are Wesley Parsons, Franklin S. Fosberg, Edward Stamm, William French Smith, George P. Schultz, Mary Joe Grotenrath, Mary Ellen Warlow, Susan Daltuva, Alan Gershal, John Graetz, Tina Parrelli and Edward Fontanive, all of whom are United States government officials represented by Bradley L. Kelly, an Assistant United States Attorney for the District of Columbia.

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## OPINIONS BELOW

The decision of the District of Columbia Court of Appeals is not reported nor is the decision or order of the District Court for the District of Columbia reported. Both opinions are reproduced in the Appendix to this petition.

## CONCISE STATEMENT OF THE GROUNDS OF WHICH THE JURISDICTION OF THIS COURT IS INVOKED

i. The date of the entry of the judgment sought to reviewed is November 22, 1989.

ii. The date of the order respecting a rehearing is January 24, 1990.

iii. Not applicable

iv. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

> The right of the people to be secure in there persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized..

## STATEMENT OF THE CASE

At 8:30 am, on July 20, 1984, while on the way to the hospital with his three year old son to visit his newborn son of the day before and wife, the petitioner was arrested, four miles from his home, on the streets of Stockholm, Sweden, by the Swedish police under the provisional arrest clause of the extradition treaty between the United States and the Kingdom of Sweden.

After arrival at the Swedish police station, the arresting officers requested the petitioner to give the keys of his, his American citizen children's and Swedish wife's residence. The petitioner questioned the purpose why they wanted the keys and was informed that "the Americans want your house searched". The petitioner refused to hand over the keys to the Swedish police, who then proceeded to remove the keys forceably from the petitioners

pocket.

The petitioner was then brought up to the Chief Swedish Prosecutor Solveig Ribberdahl's office where the petitioner immediately requested of her why, specifically, the petitioner's home was being searched, under whose authority, where in the house they intended to search and exactly what they were searching for.

The petitioner was informed after a protracted conversation that the United States Government wanted to have the house searched and they were looking for incriminating evidence, such as bank account numbers. The petitioner told Ms. Ribberdahl that he had committed no crimes in Sweden and was informed by her that he had not been arrested for any actions of his in Sweden, but solely under the provisional arrest clause of the extradition treaty. The petitioner informed the Swedish prosecutor that it was his belief that his, his three

year old and his one day old son's belongings and home were protected by the United States Constitution and that his wife's belongings were protected by the Swedish Constitution. This all took place while the petitioner's three year old son was sitting on the petitioner's lap, while the newborn baby and the petitioner's wife were in the hospital.

As the above conversation was taking place, the Swedish police had begun the first of three, five hour searches of the petitioner's Swedish residence, which were specifically requested by the Vice-counsul, Wesley Parsons of the United States Embassy in Stockholm. On each occasion the home was completely ransacked from top to bottom. Conveniently, there was no one home during the three searches conducted on July 20, 24 & 25, 1984. The petitioner was in solitary confinement and his wife still in the hospital

When the first search on July 20, 1984, was unfruitful, and after Mr. Parsons conducted a subsequent personal search of the petitioner's family's personal belongings in Ms. Ribberdahl's office, he requested Ms. Ribberdahl to again make another search for the United States. The second search was conducted on July 24, 1984. Mr. Parsons then reviewed the personal effect of the family in Ms. Ribberdahl's office, this time witnessed by the petitioner because he was brought to the office to talk to Mr. Parsons. In Mr. Parson's hands was a love letter that petitioner had written to his wife. The rest of the personal effects were on the table in front of him. The petitioner became upset, verbal and informed both the prosecutor and Mr. Parsons that neither one of them had the right, unless they were in Russia, to rummage through the petitioner's house and through the family's personal property.

The petitioner was returned to his cell and thereafter, for the third time the house was searched and ransacked.

The petitioner was extradited under a decision by the Swedish Supreme Court, made a plea agreement with the United States Government and then filed suit for the Fourth Amendment violation under the constitutional tort theory established by this Court in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, pursuant to 28 U.S.C. §§ 1331 & 1343.

Intially, the complaint was dismissed by Judge Pratt of the District of Columbia District Court, sua sponte, citing no cause of action. The petitioner appealed this dismissal and the District of Columbia Court of Appeals reversed and remanded the case holding that the complaint had an arguable basis in law and fact and that sua sponte dismissal was therefore improper.

The District Court then denied appoint-

ment of counsel, failed to respond to a motion for reconsideration of the appointment of counsel and issued an opinion and order without allowing the petitioner to conduct discovery or submit a motion in opposition to summary judgment.

The petitioner appealed Judge Thomas Hogan's decision and was denied relief by the Court of Appeals for the reasons stated by the district court

The petitioner petitioned for a rehearing and suggestion for rehearing en banc which was denied by an order filed January 24, 1990, which was received by the petitioner on March 29, 1990.

## REASON FOR GRANTING THE WRIT

The trial court in the instant case reasoned:

> . . . the general rule is is that the Fourth Amendment is not implicated at all in searches and seizures in foreign countries by foreign authorities, even where the rights of American citizens are involved. (pg. 6, District Court "Memorandum Opinion", dated April 6, 1989)

Essentially, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the trial court "substantially for the reasons stated by the district court in its order filed April 6, 1989. (per curiam order, D.C. Cir. November 22, 1989)

The court's ruling as quoted above, is precisely contrary to the holding of this Court in Reid v. Covert, 354 U.S. 1, 5 (1957):

> The United States is entirely a creature of the Constitution.

> Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which is the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. (emphasis added)

More recently, this Court, in United States v. Verdugo-Urquidez, slip opinion No. 88-1353, decided February 28, 1990, inferrentially agreed with and continued to support the Reid decision, supra, remarking:

> Since respondent is not a United States citizen he can derive no comfort from the Reid holding. Id at 10

Petitioner submits that precedent established by this Court in the cited cases, supra, has been completely undermined by the lower courts in the instant case, regarding the unreasonable searches and seizures clause of the Fourth Amendment.

However, if one argues that Reid and Verdugo-Urquidez have left open the instant issue regarding a United States citizen's Fourth Amendment right to protection from unreasonable searches and seizures while in a foreign country, then this Court should now resolve the issue by granting the writ sought herein, especially in light of this Court's settlement of the same issue as it applies to a foreigner in Verdugo-Urquidez, supra.

The proposition in question is important to every American citizen who travels abroad, resides abroad or does business abroad, and is essential to constitutional government. Expediency and overzealousness should not be allowed to sacrifice the Constitution and rule of law.

The case and controversy on the issue in question was triggered by the lower court's ruling granting the motion for summary dismissal of petitioner's cause of action based

on the qualified immunity doctrine. Yet, the Reid decision counters such a defense, since that case clearly established a United States citizen's right to constitutional protection, even if residing in a foreign country. A reasonable thinking person would have been put on notice to this effect, and would have realized he must comply with the constitutional mandate in question or waiver his right to claim protection for his actions under the immunity doctrine.

The search and seizure in this case by Swedish agents acting for the United States agents was warrantless and absent exigent circumstances. In addition petitioner was in police custody and his residence was unoccupied, since his wife was in the hospital giving birth to a baby. Nevertheless, the agents in question raided the premises. The conduct specifically violated the principles enunciated in Payton v. New York, 445 U.S. 573 (1980) and Elkins v. United

States, 364 U.S. 206 (1970). Had the search been conducted in the United States the cited authority would have reprobated same as unconstitutional and illegal conduct on the part of the agents in question.

The impact of the decision in this case is to prophetically extend the holding of Verdugo-Urquidez decision to include not only foreigners but also citizens of the United States, and to exclude citizens of the United States residing abroad from the protection of the Fourth Amendment. Hence, effectively, the lower courts in the instant case have flaunted precedent established by this Court in Reid, supra.

The issue in question is a necessary adjunct to the decision in Verdugo-Urquidez, and in these times, this case presents the opportunity to this Court to close the circle left open in Verdugo-Urquidez.

The integrity of the judicial system requires attention to the matter in question

to bring the lower court's rulings and sheanigans in line with precedent, judicial fairness and the veneral doctrine in question. The writ must be granted, less the tail is to wag the dog.

Respectfully submitted,

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FPC Eglin AFB, FL 32542

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| Thomas D. Powell, | ) |
| | ) |
| Plaintiff | ) |
| | ) |
| v. | ) Civil Action No. |
| | ) 86-1755 |
| Wesley Parsons, et al., | ) |
| | ) |
| Defendants | ) |

MEMORANDUM OPINION

Plaintiff filed this damage action under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), on June 24, 1986, alleging that defendants, twelve federal officials, had violated his Fourth and Fifth Amendment rights by conspiring to dupe Swedish authorities into conducting warrantless and unreasonable searches of his house in Sweden. On the same day it was filed, Judge Pratt of this Court by fiat sua sponte dismissed the complaint, finding "no cause of action stated." On February 23, 1987, the Court of Appeals

reversed, holding that the complaint had an arguable basis in law and fact and that sua sponte dismissal was therefore improper. Powell v Parsons, No 86-5463 (D.C. Cir. 1986) (per curiam) (unpublished memorandum opinion). The case was thereafter assigned to the present judge.

On April 21, 1987, plaintiff filed a motion for appointment of counsel, later supplemented by an "addendum" and a motion to expedite on June 18, 1987. While that motion was still pending, the government filed on August 31, 1987, a motion to dismiss or, in the alternative, for summary judgment. In response to the -



government's motion, plaintiff on September 17, 1987, filed a motion to stay the proceedings until January, 1991, should the Court deny his motion for appointment of counsel.[1] On December 17, 1987, the Court

denied plaintiff's motion for appointment of counsel and his motion for a stay.[2] Plaintiff was further ordered to respond to the government's motion within twenty days, i.e., by January 6, 1988. On January 4, 1988, plaintiff filed a motion for reconsideration, which was still pending when the Court on March 24, 1988, referred this case to Magistrate Dwyer for her report and recommendation as part of a broader referral of plaintiff's cases.

On September 28, 1988, Magistrate Dwyer issued an "Order" dismissing the case for plaintiff's failure to abide by this Court's December 17, 1987, Order. The Magistrate reasoned that "(a)lthough he clearly received this (December 17, 1987) Order as he filed a motion to reconsider the denial of an appointment of counsel, the plaintiff has not as of this date some nine months later obeyed the Order of the

Court that he respond to the motion to dismiss." A United States Magistrate to which a case has been referred without the consent of the parties does not, of course, have the power to involuntarily dismiss the case. 28 U.S.C. §-

[1] The length of the requested stay was based on plaintiff's representation that his projected release date was July 20, 1990.

[2] The Court notes for the record, however, that it did contact the District of Columbia Bar, Office of Public Service Activities, in an attempt to secure pro bono counsel for plaintiff. This attempt, like plaintiff's similar attempt with several major law firms, was unavailing.



636 (b) (1) (A). Magistrate Dwyer obviously intended her Order of dismissal as merely a recommendation to the Court, and it has been treated as such. Likewise, plaintiff's "Notice of Appeal" of the Magistrate's proposed Order, which was filed within the ten days permitted by statute and local rule, see id. at § 636 (b) (1), Local Rule 504 (b), shall be treated as a timely objection to the Magistrate's recommendation.

The Court has conducted a de novo review of the matter and determines that it would not be in the interests of justice to dismiss this action on the grounds proposed by the Magistrate -- although it probably would not be an abuse of discretion to do so. [3] Instead, the Court has determined to reach the merits of the government's motion for summary judgment without permitting plaintiff any further opportunity to respond thereto. This will impose no injustice on the plaintiff, as the Court finds upon careful review of the record that the sum and substance of -

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[3] Plaintiff is a frequent litigant in this Court and is well aware of his obligation to obey Court Orders. See generally In re Thomas Powell No. 87-7122 (D.C. Cir., Oct. 28, 1987) (unpublished order and memorandum); In re Thomas D. Powell, 851 F 2d 427 (D.C. Cir. 1988). Although plaintiff has no legal training, this Court has seen many articulate and intelligently argued pleadings he has filed in his various cases. The Court thus found in denying his motion for appointment of counsel, and remains convinced, that plaintiff is capable of maintaining this acition pro se. Outside of his pro se status, the only cause proferred by plaintiff

for his failure to abide by this Court's December 17, 1987, Order to file an opposition to the government's motion is that his motion for reconsideration of that Order was still pending. While plaintiff may have thought that his motion for reconsideration somehow tolled his obligation to comply, however, he offers no excuse for his failure even to clarify his obligation to do so in the eight months between his motion and the Magistrate's Order.

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plaintiff's argument is contained in material he has already submitted.[4] Having determined to reach the merits on the present record, the Court shall grant summary judgment for defendants on grounds of qualified official immunity.

Summary judgment, of course, lies where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c) Moreover, summary judgment must be entered "after adequate time for discovery and upon motion, againist a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). [5]

[4] In particular, plaintiff submitted a hand written version of his motion to stay, filed September 17, 1987, which contained his own affadavit; a copy of a motion to suppress raising the legality of the search in Sweden, filed by defense counsel in his criminal case; and other documents. Plaintiff stated that these materials "were also being submitted in opposition to the Motion to Dismiss, or in the Alternative, for Summary Judgment heretofore filed by the defendants." Plaintiff's Motion to Stay at 6 (unpaginated, handwritten).

[5] Plaintiff's position is doubtless that there has not been adequate time or opportunity for discovery. The answer to this is twofold. Firstly, plaintiff undertook no discovery even though the Court never entered a protective order barring him from doing so; and, indeed, the Court, in an Order issued August 25, 1987, denying plaintiff's motion to compel the Department of State to disclose the address of a former official named as a defendant, reminded him that he "use the usual channels, such as submitting proper discovery requests." Secondly, and most importantly, the Court finds discovery unnecessary to reach the qualified immunity issues. The Court has also heeded the United States Supreme Court's guidance in a similar Fourth-Amendment Bivens action, that "(o)ne of the purposes of the

Harlow [v. Fitzgerald, 457 U.S. 800 (1982)] qualified immunity standard is to protect public officials from the 'broad ranging discovery that can be peculiarly disruptive of effective government. ..'...and for this reason...qualified immunity questions should be resolved at the earliest possible stage of litigation....[and] any such discovery should be tailored specifically to the question of...qualified immunity." Anderson v. Creighton, 107 S. Ct. 3034, 3042 n.6 (1987)(citations omitted).

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Furthermore, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

The Court's analytical starting point is the well-settled proposition relied upon by the Court of Appeals in reversing the initial sua sponte dismissal of this case "(t)hat the Bill of Rights has extra territorial application to the conduct abroad of federal agents directed against United States citizens." United States v.

Toscanino, 500 F 2d 267, 280 (2d Cir. 1974)[6] Thus, "(w)hen the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another country." Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion), quoted in United States v. Verdugo-Urquidez, 856 F 2d -

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[6] The Court of Appeals' ruling, however, went no further than holding that plaintiff's complaint was not properly subject to sua sponte dismissal; it did not rule that the facts of Toscanino, involving kidnapping and torture, were somehow analgous to this case. Toscanino involved "conduct of the most outrageous and reprehensible kind by the United States government agents." United States ex rel Lujan v. Gengler, 510 F 2d 62, 65 (2d Cir.) cert. denied, 421 U.S. 1001 (1975), which -- even taking plaintiff's complaint at face value -- cannot be said of this case.

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1214, 1217 (9th Cir. 1988), petition for cert. filed (U.S., Feb. 13, 1989).

The particular constitutional rights at issue in this case are those protected by the Fourth Amendment, which provides that

> (t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend IV. As the United States Supreme Court has explained, "the Fourth Amendment has drawn a firm line at the entrance to a house. Absent exigent circumstances, that threshold may not be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980), quoted in Steagald v. United States, 451 U.S. 204, 212 (1981). Additional considerations apply, however, when the house at issue is outside of the United States.

In fact, the general rule is that the Fourth Amendment is not implicated at all in searches and seizures in foreign countries by foreign authorities, even where the rights of American citizens are involved. E.g., United States v. Morrow, 537 F 2d 120, 139 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977) See generally Verdugo-Urquidez, 856 F 2d at 1224-25 (and cases cited therein). There are two exceptions to this general rule. First, the Fourth Amendment is implicated by foreign searches and seizures that"'shock the judicial conscience.'" Morrow, 537 F 2d at 139 (quoting Birdsell v. United States, 346 -



F 2d 775, 782 n.10 (5th Cir.), cert. denied, 382 U.S. 963 (1965)). Second, the Fourth Amendment is implicated where the foreign authorities were acting as "agents

for their American counterparts." Id. (citations omitted). The latter exception has also been called the "joint venture" doctrine, which holds that "the Fourth Amendment could apply to raids by foreign officials...if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and foreign officials." Stonehill v United States 405 F 2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969), quoted in Verdugo-Urquidez, 856 F 2d at 1124-25.

In the present case, there are no allegations that shock the Court's conscience, even giving plaintiff every benefit of the doubt. As the first element of his case, therefore, plaintiff must establish a "joint venture" between the defendants and the Swedish authorities in conducting the allegedly warrantless and unreasonable search of his home in Sweden.

Yet even if plaintiff establishes a joint venture, he must still overcome defendants' qualified immunity to this damage action under Bivens. It bears reemphasis that plaintiff here is not seeking to suppress illegally seized evidence against him -- an avenue of relief open to him but not pressed in his criminal case, see infra pages 11-12 -- rather he seeks to hold each and -



every individual liable for $150,000 in compensatory and $200,000 in punitive damages. 7

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7 To the extent plaintiff seeks to recover against defendants in their official, as opposed to individual, capacities, his action is barred by soverign immunity. See Bivens, 403 U. S. at 410 ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.") (Harlan, J., con curring). In the Federal Tort Claims Act, the United States has not waived its immunity for

"(a)ny claim arising in a foreign country." 28 U.S.C. § 2680 (k).

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While it has been recognized that "(w)hen governmental officials abuse their offices, 'action(s) for damages may offer the only realistic avenue for vindication of constitutional guarantees,'" Anderson 107 S. Ct. at 3038 (quoting Harlow, 457 U.S. at 814), such officials nonetheless enjoy a qualified immunity, "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Id. (Citations omitted). The officials' actions are judged under an "objective legal reasonableness" standard, which looks to whether the actions violated "clearly established" rights. Id. (quoting Harlow, 457 U.S. at 881-19). "The contours of the right must be sufficiently clear

that a reasonable official would understand that what he is doing violates that right." Id. at 3039.

Thus, to paraphrase an analgous Bivens suit premised on a warrantless search,

> the relevant question in this case... is the objective (albeit fact-specific) question whether a reasonable officer could have believed (the Swedish officers') warrantless search to be lawful, in light of clearly established law and the information the -



> searching officers possessed. (Defendants') subjective beliefs about the search are irrelevant.

Id. at 3040.

In sum, it is through the "prism" of the Fourth Amendment and official immunity standards that the record in plaintiff's case must be viewed on summary judgment. And, as set forth below, plaintiff's case does not withstand scrunity under that prism.

The following facts are undisputed. On March 16, 1984, plaintiff was indicted on charges of tax evasion, and on June 27, 1984, he was indicted on various drug trafficking charges, by a federal grand jury in the Eastern District of Michigan. See Defendant's Motion, Exhibits 4-7. He was also facing drug trafficking charges in a Florida state court. See id. at Exhibit 8 (State v. Powell, No. CF79-3099 (Fl. Cir. Ct.)). Judge Rhodes of the United States District for the Eastern District of Michigan issued an arrest warrant on the federal charges on June 27, 1984. See id. at Exhibit 7.

On July 19, 1984, the United States Embassy in Stockholm, Sweden, by diplomatic note to the Swedish Ministry of Foreign Affairs, requested "the provisional arrest of Thomas Daniel Powell for the purposes of extradition, pursuant to

the General Obligations set forth in Articles I and XII of the Convention and Protocol on Extradition between the United States of America and Sweden rstified on October 24, 1961." Id.[8] Pursuant to that -

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[8] The cited Convention is reproduced at T.I.A.S. No. 5486

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request, Swedish authorities provisionally arrested plaintiff in Stockholm on July 20, 1984. See Affadavit of Thomas D. Powell at ¶ 2; Defendant's Motion at Exhibit 9. The District Court of Stockholm was informed of the arrest that same day and "decided on 24 July, 1984 that the arrest be maintained." Defendants' Motion at Exhibit 9. Swedish authorities also searched plaitiff's house and later turned over seized items to American authorities. See id. at Exhibit 10.[9]

9 Defendants' Exhibit 10 is an August, 1984 wire from the United States Embassy to the Drug Enforcement Administration, which reads as follows:

REF: Copenhagen 04963 DTG 0 201257Z JUL84

1. REFTEL REPORTED ARREST OF FUGITIVE THOMAS DANIEL POWELL (V) IN SWEDEN AND FACT SWEDISH POLICE WERE TO SERVE SEARCH WARRANT ON POWELL'S RESIDENCE IN STOCKHOLM. AS RESULT OF SEARCH, VARIETY OF DOCUMENTS, THREE TEAR GAS GUNS (ILLEGAL IN SWEDEN), AND VERY SMALL QUANTITY OF SUSPECTED COCAINE (0.2 GM.) HAVE BEEN SEIZED BY SWEDISH POLICE. SUSPECTED COCAINE WAS FOUND IN SUITCASE BELONGING TO POWELL'S WIFE, BIRGITTA MURMAN-POWELL (V), AND SHE HAS SINCE TOLD POLICE COCAINE BELONGS TO HER. SHE WILL BE PROSECUTED IF LABORATORY ANALYSIS POSITIVE FOR COCAINE. HE, IN ALL LIKELIHOOD, WILL BE CHARGED WITH TEAR GAS GUNS.

2. AMONG DOCUMENTS FOUND WERE:

A) THREE ADDRESS BOOKS AND PIECE OF WRITING PAPER WITH NAMES/ADDRFSSES/TELEPHONE NUMBERS.
B) POWELL'S EXPIRED AND CURRENT U.S. PASSPORT J1077818 (96 PAGES) AND Z4115846, RESPECTIVELY.
C) LETTER TO MR. ALEXANDER IN WHICH POWELL DISCUSSES HIS (POWELL'S) FINANCIAL HOLDINGS.
D) SHIPPING DOCUMENT DATED 11 JUNE 84 FOR PERSONAL EFFECTS MADE OUT TO POWELL AT ADDRESS IN ST. PETERSBURG BEACH, FLORIDA.
E) COPY of 564 PAGE Q&A SWORN STATEMENT OF (DELETION) TAKEN ON 18 SEPT 80 AT FEDERAL CORRECTIONAL INSTITUTION, MILAN, MICHIGAN BY DEA/IRS/CUSTOMS.
F) STOCK CERTIFICATE FOR 2000 SHARES OF POWELL PROPERTIES, INC. SIGNED OVER TO BIRGITTA MURMAN-POWELL.

3. COPIES OF ABOVE (ONLY PAGES 1, 563 AND 564 OF ITEM E) WILL BE FORWARDED TO S/A GRAETZ FOR ANALYSIS/REVIEW. A COPY OF PRELIMINARY ANALYSIS OF POWELL'S TWO PASSPORTS WILL ALSO BE SENT. ORIGINAL DOCUMENTS IN CUSTODY OF SWEDISH POLICE.

4. NO FINANCIAL RECORDS WERE FOUND TO INDICATE ANY CURRENT BANK ACCOUNTS OUTSIDE SWEDEN. RECORDS WERE FOUND INDICATING POWELLS HAVE FOUR SMALL CHECKING/SAVINGS ACCOUNTS IN SWEDEN. SWEDISH POLICE HAVE ALSO, HOWEVER, MADE INQUIRIES TO ALL FINANCIAL INSTITUTIONS IN SWEDEN REGARDING HOLDINGS BY POWELLS. RESPONSES SHOULD BE RETURNED IN SIX-EIGHT WEEKS.

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-11-

On August 29, 1984, the United States issued a seven-page diplomatic note formally requesting plaintiff's extradition. See id. at Exhibit 13. Upon judicial review of the request, the Swedish Supreme Court upheld the extradition on the drug trafficking charges and on some, but not all, of the tax evasion charges. See id. at Exhibit 14.[10] Plaintiff was then escorted back to the United States from Sweden by United States Marshals on Jan-

uary 9, 1985. See id. at Exhibit 15. Finally, in December, 1985, plaintiff pleaded guilty to the charges on which he was extradicted, pursuant to a conditional plea agreement. See id. at Exhibit 16.

Before reviewing plaintiff's allegations, the Court first notes that the question of the legality of the search in Sweden was initially raised by plaintiff's defense attorneys in his criminal case before Judge Freeman of the United States District Court for the Eastern District of Michigan. See Motion for Order

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10 Plaintiff was represented in these preceedings by two Swedish attorneys, Lars Engstrand and Carl-Oskar Kling. See id. at 10.

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Suppressing Documents in the Government's Possession Which Were Illegally Seized

from Defendant's Residence in Sweden, United States v. Powell, No.84-20374 (E. D. Mich.) (filed June 17, 1985) (Attachment A to Affadavit of Thomas D. Powell, filed Sept. 17, 1987). Moreover, plaintiff's criminal case was the logical venue for a full and fair adjudication of the issue. However, the Court's research indicates that there was never a ruling on the merits of the motion to suppress, and that, instead, the motion was held in abeyance following a hearing on October 30, 1985. See Rule 11 Plea Agreement, United States v. Powell, No. 20374 (E.D. Mich.) (Defendant's Motion at Exhibit 16).

The Court finds it baffling, given plaintiff's present allegations of serious improprieties, that he took no further steps to preserve the issue for appeal in his criminal case. In his conditional plea agreement plaintiff preserved his right to appeal the denial of his motions

to dismiss on other grounds but expressly "waive(d) his right to appeal all other issues previously raised by him in this cause." Id. at 2 ¶ B.[11] Plaintiff also agreed "to dismiss all pending civil lawsuits against the United States, withdraw all pending Freedom of Information Act (FOIA) requests relating to or emanating out of -

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[11] Plaintiff's subsequent appeal pursuant to his conditional plea was unsuccessful and his conviction was affirmed. United States v. Powell, 823 F 2d 996 (6th Cir.]987)

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the prosecution of this criminal case." Id. at 6. Undoubtedly, therefore, the present Bivens action, premised on arguments plaintiff had abandoned in his criminal case, came as a surprize to his prosecutors, including defendants here. Moreover, although defendants do not make the argument, there is a strong basis for finding that plainti-

ff has effectively waived the right he now asserts. Since the issue has not been briefed, however, the Court shall not reach it.

The gravaman of the complaint in this action is that defendant Wesley Parsons, then allegedly vice consul of the United States' Embassy in Sweden, in conspiracy with the other defendants,

> did make, without probable cause, requests to Mikael Westerlind of the Swedish Foreign Department and/or members of the Swedish Department of Justice and/or other government officials to consider, initiate and execute an unfounded, unreasonable and war rantless search and seizure, without probable cause or exigent circumstances, of private persons, effects and residences of the plaintiffs, on or about July 20, (24,25) 1984.

Complaint at Count I.

A goal of the defendants' alleged conspiracy was to "dupe the members of the Swedish Government to violate the Fourth Amendment for them." Id. at Facts, ¶ 21.

On the Swedish authorities' role, the complaint alleges that "(t)he Swedish Government had no idea that they were violating the plaintiff's Constitutional rights, nor were they informed that they were violating those rights, or they would not have performed the search at the request of the defendants." Id. at Cause of Action -



(emphasis in original). At the same time, the complaint alleges that "(t)he Swedish Police, acting as agents for the co-conspirators, without a warrant or upon information amounting to probable cause, did in fact, unreasonably search the plaintiff's house on July 20, 24,and 25, 1984 on behalf of the conspirators," and that "(t)he whole house was completely ransacked during all three searches." Id. at Facts ¶¶ 25, 29. Furthermore, it is alleged that "(t)he search of the plaintiffs (') house was un-

lawful under Swedish law." Id. at ¶ 36.

The government argues in moving for summary judgment that "plaintiff has not shown, and cannot show, any involvement of any of the individual defendants here in the search by the Swedish authorities at all, much less any that would render the Swedish authorities mere agents of such defendants for Fourth Amendment purposes." Defendant's Motion at 11 (emphasis in original). The Court, however, must disagree. For, in addition to the bare allegations of the complaint, plaintiff has submitted materials which, in the Court's view, create a genuine issue of material fact regarding whether Swedish police searched plaintiff's house at the request of American officials.

First, plaintiff's affidavit attests that following his arrest by Swedish police on July 20, 1984, the arresting officers

forcibly took from him the keys to his residence, stating to him that "The Americans want your house searched." Affidavit of Thomas D. Powell at ¶¶ 3-4 (attached to plaintiff's motion to -



stay, supra note 4.) Second, and more significantly, plaintiff has also submitted independent documents which support his contention that the search of his residence was done at the request of American officials. In particular, plaintiff has submitted the affidavits of his two Michigan defense attorneys, which were originally filed with the federal court in Michigan in support of the motion to suppress, discussed above.[12]

One affidavit relates a telephone conference call between plaintiff's defense attorney, the Assistant United States Attorney prosecuting the criminal case (Mr. Liebson), and Mr. Westerlind, an official

with the Legal Department of the Ministry of Foreign Affairs of the Government of Sweden:

> Mr. Westerlind further stated that he recalled that on July 20, 1984, he received a telephone call from Mr. Wesley Parson(s), an American Consulate official. During that telephone call, Mr. Parson(s) made the request that when the Swedish authorities arrested Thomas Powell that they search his home at Delagargatan 18, Stockholm. In response to a question from Mr. Leibson, Mr. Westerlind reviewed his file and advised that he did not see any indication in it that this request from Mr. Parson to search Mr. Powell's residence was memoralized in any written communication sent by any American official. Mr. Westerlind stated that at the conclusion of this telephone conversation with Mr. Parson(s) he prepared the referenced document dated July 20, 198(5)4, had it typed and signed it. Because it was an Embassy request, this matter was given expedited handling. This document memoralizing -

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12 Affidavit of Robert W. Powell in Support of Defendant Powell's Motion for Order Suppressing Documents in the Government's Possession Which Were Illegally Seized from Defendant's Residence in Sweden (Attachment B to Affidavit of Thomas D. Powell, supra); and Affidavit of Robert P. Hurlbert in Support of Defendant Powell's Motion for Order

> the request of the American Embassy was immediately taken by courier from Mr. Westerlind to the Chief Prosecutor's Office in Stockholm, Sweden on the same day, July 20, 1984.

Affidavit of Robert P. Hurlbert, supra note 12 at 3.

The "referenced document dated July 20, 1985", by Mr. Westerlind, is, in turn, the subject of and attached to the other affidavit submitted by plaintiff. Mr. Westerlind records in that document that

> (t)he embassy of the United States in Stockholm requested of the State Department in a note of July 19, 1984.. ..a temporary restraint while awaiting extradition (i.e., a "provisional arrest") of the American citizen Thomas Daniel Powell, born on December 1, 1947 in Detroit, Michigan. The embassy, in its contacts in this regard with the Department, made the oral request that Powell's home at Delagargatan 18 (Hagersten) in Stockholm be searched, in connection with this restraint.

Letter from Mikael Westerlind, Legal Division

State Department, to State Prosecutor, Stockholm (stamped as sent July 20, 1984, and received July 23, 1984)(emphasis in original) (unofficial translation by Berlitz Translation Service) (attached to Affadavit of Robert W. Powell, supra, note 12.

Plaintiff has thus made a viable showing that the search of his house was done at the request of Mr. Parsons and the American Embassy. But, other than the above documents, there is no evidence of the exact nature of the request. In light of plaintiff's allegation that Swedish authorities "had no idea" and were not informed that they were being asked to violate his constitutional rights, however, the only plausible inference is that defendants in no way conveyed their alleged conspiratorial -

motives to the Swedish authorities in making the request.[13] That is, plaintiff's theory is that the Swedish officials were "duped" into doing defendants' dirty work for them. He does not allege in the complaint that Swedish officials formed part of the "conspiracy" against him, and no Swedish officials are named as defendants[14] It hardly comports with this theory that the request was to "Please conduct a warrantless and unreasonable search of Mr. Powell's house for us, and ransack it while you're at it." To be plausible therefore, the request must have been simply "Please search Mr. Powell's house for us." Such a request is fully consistent with the documents submitted by plaintiff.

A simple request, however, does not explain how defendants thereby duped Swedish authorities into conducting a search of plaintiff's house without a warrant and

without probable cause, which allegedly violated both American and Swedish law. The explanation must lie in the plaintiff's allegation that the conspiracy against him began in July, 1984, "when agent John Graetz submitted a perjured affadavit in the Court of the -

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[13] Plaintiff, of course, is entitled to have all inferences drawn in his favor on summary judgment; however, those inferences must be plausible. E.g., Gramenos v Jewel Co., Inc., 797 F 2d 432, 436 7th Cir ]986 ("Plausible inferences must be resolved in favor of the part opposing summary judgment, but the inferences (plaintiff) presses on us are not plausible."), cert. denied, 481 U.S. 1028 (1987)

[14] Plaintiff's faith in the Swedish officials motives appraently remained unshaken after his arrest and extradition, as two pages of his subsequent plea agreement contemplate a petition by him for a transfer to Sweden to serve his sentence. See Rule 11 Plea Agreement, supra page 12 at 3-4.

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Honorable Ralph M. Freeman, in the Eastern District of Michigan, in case number 84-20374." Complaint at Facts ¶ 37. That is, plaintiff's underlying premise is that def-

dants first fabricated the probable cause in the United States and then fooled Swedish authorities with it. Here, however, is where plaintiff's case begins to crumble under the weight of other uncontradicted evidence in the record.

That record, as defendants correctly state,

> demonstrates that plaintiff was a fugitive from the United States, wanted on serious drug trafficking and tax evasion charges. The only reference plaintiff makes to these charges in his complaint is oblique and misleading. Without making the slightest effort to substantiate the claim, plaintiff asserts that Defendant Graetz submitted a perjured affadavit (concerning drug trafficking charges) to the Honorable Ralph M. Freeman in the Eastern District of Michigan in Case No. 84-20374. Plaintiff's cavalier accusation of impropriety in that case is undercut.. ..by the fact that plaintiff eventually pleaded guilty to those very drug trafficking charges before Judge Freeman in that same case ....(The Swedish) extradition process, initiated and executed through formal diplomatic communiques and approved by the Stockholm District Court and the Swedish Supreme Court, was lawful. Certainly plaintiff has not suggested otherwise; indeed his approach has

been to pretend that he was not arrested or extradicted at all.

Defendants' Memorandum at 9-10 & n.2 (text of footnote included). Although plaintiff would have the Court to do so, the Court will not ignore the full picture in this case.

Plaintiff at most has made a colorable showing that the first element of his case is satisfied, i.e., that the Fourth Amendment has been implicated by the search, since it was done at the request of American officials. It is hardly "clearly established", however, that a request by American officials to -



conduct a search, without more, establishes such a joint venture. See, e.g., United States v. Molina-Chacon, 627 F Supp. 1253, 1260 (E.D.N.Y. 1986) ("the mere fact that a foreign search or seizure is prompted by information from United States officials

is not sufficient justification to apply the Fourth Amendment"). There is no suggestion by plaintiff that American officials physically took part in the search. And, although Swedish officials in fact turned over seized items, the record shows that defendants did not need to make any surreptitious arrangements for this favor: the extradition treaty between the United States and Sweden required as much. Convention, supra page 9 & note 8, at Article X. Nonetheless, even if the Court assumes for present purposes that plaintiff could establish the requisite "joint venture", it would not overcome defendants' qualified immunity defense.

That defense sheilds defendants because the Court finds that an objective official in the defendants' position under the circumstances would have every reason to believe that the Swedish authorities

would act within the law in carrying out the request to search plaintiff's residence.

Plaintiff claims in his affadavit that his house was searched "without a United States or Swedish search warrant." Affadavit of Thomas D. Powell at ¶ 5. He does not explain how he learned this, however, since his defense attorney represented to the federal court in Michigan that "(n)either (Mr. Powell) nor his wife were able to observe the search." Motion to Suppress,

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supra page 11, at 2. Furthermore, his contention conflicts with an otherwise unimpeached government wire, which indicates that Swedish police were to serve a search warrant on plaintiff's residence. See Wire, supra note 9. Finally, plaintiff's contention that Swedish authorities acted without

a warrant and violated their own law is almost incredible given all the other evidence in the record that Swedish officials scrupulously adhered to their leagal procedures in arresting and extraditing plaintiff. Nonetheless, even if the Court again gives plaintiff the benefit of the doubt that there was no Swedish search warrant, plaintiff cannot show that it was unreasonable for defendants to believe that such a warrant would issue.

Firstly, the record shows that a federal judge in the United States had issued a warrant for plaintiff's arrest. And it is clearly established American law that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."

Payton v New York, 445 U.S. 573, 603 (1980). Although it is unclear, it appears from the record that plaintiff was not arrested at his house, but somewhere else, early in the morning on July 20, 1984. See Affidavit of Thomas D. Powell at ▪‖ ▪‖ 2-3. However, the record further indicates that Mr. Parsons' telephone call to Mr. Westerlind was also on July 20, 1984 --although the time of day of the call is not clear -- and that he "made the request that when the Swedish authorities -



- arrested Thomas Powell that they search his home." Affidavit of Robert P. Hurlbert, supra note 12 (relating statement, of Mr. Westerlind) (emphasis added); see also Affidavit of Robert W. Powell, at attachment, supra note 12 (Mr. Westerlind's contemporaneous mem-

orandum of this conversation, indicating requested search was to be "in connection with this restraint, (i.e., provisional arrest)"). This evidence submitted by plaintiff indicates that Mr. Parsons did not know, at the time of his call, that plaintiff had been arrested, either because he had not been arrested yet, or because Mr. Parsons did not know of his arrest. In any case, it was therefore reasonable for Mr. Parsons and his co-defendants to believe that the search of the house would be incident to the arrest.

Furthermore, the Swedish authorities had been given ample information to justify, under American law, the issuance of a search warrant. They were told on July 19, 1984 (i.e., before the arrest) that plaintiff was a fugutive who had been indicted in the United States on serious felony charges and that a warrant for his arrest was outstanding. See Defendants'

Motion at Exhibit 7 (text of Embassy Note No. 289, requesting provisional arrest of plaintiff); see also id. at Exhibit 9 (Swedish response informing of arrest). While the parties have not briefed and the Court has not otherwise determined relevant Swedish law, see Fed. R. Civ. P. 44.1, it was certainly objectively reasonable for defendants to believe that this information would support the issuance of a local warrant. Moreover, given the Swedish -

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authorities' otherwise strict adherence to their laws in dealing with plaintiff, it was objectively reasonable to believe that a local warrant would, in fact, be issued.[15] Cf. United States v. Peterson, 812, F 2d 486, 492 (9th Cir.1987) (search could be justified based on United States officials' good faith reliance on foreign law enforcement officers' representations that they

had complied with local law), distinguished in Verdugo-Urquidez, 856 F 2d at 1229-30.

In sum, the Court holds that defendants are entitled to qualified official immunity to plaintiff's claims even if Swedish officials acted as defendants' agents, and even if the search as it was untimely executed somehow violated the Fourth Amendment, because it was objectively reasonable for the defendants to believe the search would be legal. Accordingly, summary judgment shall be enterred for defendants on these grounds.[16]

Plaintiff informs the Court that all the documents seized from his residence in Sweden were returned to him in January 1986. Affadavit of Thomas D. Powell at ¶ 13. This is all the relief he was due, as his present suit for money damages is -

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[15] The Court has already noted above that it

would be implausible under plaintiff's theory to infer that defendants may have asked Swedish autho-ities not to procure a local warrant in making the request to search plaintiff's house.

16 The Court's ruling is without prejudice to defendant's preliminary arguments concerning service of process and venue, which the Court has not found it necessary to address.

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without merit. An Order in accordance with this Memorandum Opinion shall be issued herewith.

DATED 6th April 89

/s/
Thomas F. Hogan
United States District Judge

| | | |
|---|---|---|
| THOMAS D. POWELL, | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| v. | ) | Civil Action No. |
| | ) | 86-1755 |
| WESLEY PARSONS, et al., | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |

ORDER

In accordance with the Memorandum Opinion issued herewith, it is this 6th day of April, 1989,

ORDERED that summary judgment shall be GRANTED in favor of defendants and this case DISMISSED with prejudice.

/s/
Thomas F. Hogan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5145 September Term, 1989
C.A. No. 86-01755

Thomas D. Powell,

Appellant

v.

FILED NOV. 22, 1989

Wesley Parsons, et al.

BEFORE: Wald, Chief Judge; Edwards and Silberman, Circuit Judges

O R D E R

Upon consideration of appellees' motion for summary affirmance, appellant's motion for summary reversal and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its order filed April 6, 1989. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). It is

FURTHER ORDERED that the motion for summary reversal be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5145 September Term, 1989
C.A. No. 86-01755

Thomas D. Powell,

Appellant

v. FILED JAN 24, 1990

Wesley Parsons, et al.

BEFORE: Wald, Chief Judge; Edwards and Silberman, Circuit Judges

O R D E R

Upon consideration of Appellant's Petition for Rehearing, filed December 20, 1989. it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5145 September Term, 1989
C.A. No. 86-01755

Thomas D. Powell,

Appellant

v. FILED JAN 24, 1990

Wesley Parsons, et al.

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration for the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curium
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/

Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1672

# In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS D. POWELL, PETITIONER

*v.*

WESLEY PARSONS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether petitioner's *Bivens* action, arising from the search of his Swedish residence, was properly dismissed on the grounds of qualified immunity.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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No. 89-1672

THOMAS D. POWELL, PETITIONER

*v.*

WESLEY PARSONS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The court of appeals' summary affirmance (Pet. App. A42) is unreported. The opinion of the district court (Pet. App. A1-A40) is also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 22, 1990. A petition for rehearing was denied on January 24, 1990. Pet. App. A43. The petition for a writ of certiorari was filed on April 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. On March 16, 1984, and thereafter on June 27, 1984, a federal grand jury in the Eastern District of Michigan

returned indictments charging petitioner—an American citizen, then living in Sweden—with tax evasion and narcotics trafficking (Pet. App. A16). Following the second indictment, the United States District Court for that district issued a warrant for petitioner's arrest (*ibid.*). On July 19, 1984, the United States Embassy in Stockholm, Sweden, acting pursuant to an extradition treaty between the two nations, requested the Swedish Ministry for Foreign Affairs to effect petitioner's provisional arrest, for purposes of extradition to the United States (*id.* at A16-A17). The following day, Swedish authorities arrested petitioner and thereafter searched his house, turning over various seized items to American authorities (*id.* at A17).

Petitioner was subsequently extradited to the United States, and in December 1985 he pled guilty to the charges on which he had been extradited (Pet. App. A19-A20). Prior to entering the plea, petitioner moved to suppress the evidence seized by Swedish authorities, alleging that the search of his residence had been unlawful. The United States District Court for the Eastern District of Michigan did not rule on that motion, and in petitioner's subsequent plea agreement he expressly waived the right to appeal the suppression issue. *Id.* at A20-A22.

2. On June 24, 1986, petitioner filed a damages action in the United States District Court for the District of Columbia, pursuant to *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) (Pet. App. A1). Petitioner alleged that 12 federal officials had violated his Fourth and Fifth Amendment rights by conspiring to dupe Swedish authorities into conducting an unreasonable search of his residence in Sweden (*ibid.*). The district court initially dismissed the complaint for failure to state a claim, but the court of appeals reversed, holding that the complaint had an arguable basis in law and fact (*id.* at A1-A2). Following the remand to the district court, the government, on behalf

of the individual respondents, moved for dismissal of the complaint or, in the alternative, for summary judgment (*id.* at A2).

On April 6, 1989, the district court granted summary judgment for respondents (Pet. App. A1-A40). At the outset, the court agreed with petitioner that the guarantees of the Bill of Rights generally protect United States citizens abroad (*id.* at A8-A9). The court also assumed, for purposes of the motion, that petitioner had sufficiently shown that the search of his house was a "joint venture" (*id.* at A12) between American and Swedish authorities, thus implicating Fourth Amendment protections (Pet. App. A25-A34). The court nevertheless rejected petitioner's claim on qualified immunity grounds, finding that "an objective official in the [respondents'] position under the circumstances would have every reason to believe that the Swedish authorities would act within the law in carrying out the request to search [petitioner's] residence" (*id.* at A34-A35). The court noted that the American Embassy had requested that petitioner's house be searched at the very same time that petitioner was arrested (*id.* at A35-A36). Under the circumstances, the court concluded, respondents had every reason "to believe that the search of the house would be incident to the arrest" (*id.* at A37)—thus obviating the need for a search warrant. In addition, the court stated, American officials had given Swedish authorities "ample information to justify, under American law, the issuance of a search warrant," and "it was certainly objectively reasonable for [respondents] to believe that this information would support the issuance of a local warrant" (*id.* at A37-A38). The court concluded that "given the Swedish authorities' otherwise strict adherence to their laws in dealing with [petitioner], it was objectively reasonable to believe that a local warrant would, in fact, be issued" (*id.* at A38). "In sum," the court held, respondents "are entitled to

qualified official immunity to [petitioner's] claims even if Swedish officials acted as [respondents'] agents, and even if the search as it was * * * executed somehow violated the Fourth Amendment, because it was objectively reasonable for the [respondents] to believe the search would be legal" (*id.* at A39). The court of appeals summarily affirmed "substantially for the reasons stated by the district court" (*id.* at A42).

## ARGUMENT

1. Petitioner asks (Pet. 10-12) this Court to resolve the question whether the Fourth Amendment applies to an overseas search of the premises of a United States citizen. That question, however, is not presented in this case. In its decision, summarily affirmed by the court of appeals, the district court expressly agreed with petitioner that the Bill of Rights generally protects American citizens abroad (Pet. App. A8-A9), and the court assumed, for purposes of the motion, that the Fourth Amendment applied on the specific facts of this case (Pet. App. A34). Although the district court nonetheless dismissed petitioner's action, it did so on qualified immunity grounds, not because it rejected petitioner's invocation of the Fourth Amendment.

Petitioner cites (Pet. 10) the district court's statement that "the general rule is that the Fourth Amendment is not implicated at all in searches and seizures in foreign countries by foreign authorities, even where the rights of American citizens are involved." But petitioner misreads that statement. In that passage, the district court made the wholly uncontroversial point that a search "by foreign authorities" is not ordinarily chargeable to American officials, and thus cannot implicate the Fourth Amendent. From that "general rule" (Pet. App. A11), the court noted that there are "two exceptions"—first, for searches that "shock the judicial

conscience"; and second, for searches that are conducted as "joint ventures" between the United States and foreign officials (*id.* at A11-A12). The court then assumed that the second exception applied in this case, and it therefore analyzed petitioner's claim on the premise that he was protected by the Fourth Amendment (Pet. App. A34).

2. Petitioner also contends that this Court's decision in *Reid* v. *Covert*, 354 U.S. 1 (1957), forecloses a defense of qualified immunity in this case. In particular, he asserts, *Reid* "clearly established a United States citizen's right to constitutional protection, even if residing in a foreign country" (Pet. 13). Accordingly, petitioner states, "[a] reasonable thinking person would have been put on notice [that] * * * he must comply with the constitutional mandate" (*ibid.*), thus depriving that person of qualified immunity. There is no merit to that claim.

In *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), this Court held that in order to overcome a defense of qualified immunity, a *Bivens* plaintiff must show that "[t]he contours" of the right allegedly violated were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." The Court emphasized that the "right" which must be "clearly established" cannot be defined at too high a level of generality. For example, the Court explained, in the Fourth Amendment context, a law enforcement official does not forfeit the right to qualified immunity simply because it is "firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment." 483 U.S. at 641. Instead, the Court stated, "[t]he relevant question * * * is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the particular] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Ibid.*

The *Reid* case does not in any respect undercut respondents' reasonable belief that the search of petitioner's house was lawful. In the first place, *Reid* did not involve the Fourth Amendment at all. The case instead concerned the Fifth and Sixth Amendment rights of civilian dependents of military personnel in court-martial proceedings overseas. Still less did *Reid* provide a rule of decision for an overseas search and seizure in a context similar to the present case – where American officials had every reason to believe that the search would be incident to a lawful arrest, and had furnished the foreign authorities with ample basis to secure a local search warrant. In short, nothing in *Reid* undermines the finding of the courts below that "it was objectively reasonable for the [respondents] to believe the search would be legal" (Pet. App. A39). The courts' factbound conclusion that respondents were entitled to qualified immunity warrants no further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
STUART M. GERSON
*Assistant Attorney General*
ANTHONY J. STEINMEYER
IRENE M. SOLET
*Attorneys*

JULY 1990

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* The Solicitor General is disqualified in this case.

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